Supreme Court, U.S.
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85-697

No.....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

WILLIAM C. WAGGONER, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*, etc.,
Petitioners,

VS.

ROBERT LEE DALLAIRE, doing business as A-JAY EXCAVATING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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QUESTION PRESENTED FOR REVIEW

Whether a court entertaining a suit under § 301 of the Labor Management Relations Act has jurisdiction to consider § 8(d) of the National Labor Relations Act in determining whether a collective bargaining agreement has terminated without prior written notice?

LIST OF PARTIES TO PROCEEDINGS BELOW

Pursuant to Rule 21.1(b) of this Court, the parties in the Court of Appeals are listed as follows:

WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, WILLIAM A. COBB, JR., HOWARD C. DENNIS, JOHN L. CONNOLLY, JOHN BEBEK, JERALD B. LAIRD, JOHN C. MAXWELL, ALEXANDER RADOS, WILLIAM SCHMIDT, WILLIAM A. FLOYD, STEVE BILLY, CECIL MONTGOMERY, HARLAND STEVENSON, MACDONALD JONES, GENE SAPPER, C. W. POSS, and WINTON KEMMIS, each in his capacity as Trustee of the OPERATING ENGINEERS HEALTH AND WELFARE FUND; WILLIAM C. WAGGONER, FRANK TODD, WILLIAM A. COBB, JR., FREEMAN ROBERTS, DALE VAWTER, JOHN L. CONNOLLY, C. V. HOLDER, JOHN BEBEK, KENNETH J. BOURGUIGNON, HOWARD C. DENNIS, JAMES J. KIRST, JOHN C. MAXWELL, ALEXANDER RADOS, EDWIN KALISH, WINTON KEMMIS, DEAN SWEENEY, JR., GENE SAPPER, STEVE BILLY, CECIL MONTGOMERY, HARLAND STEVENSON, and WILLIAM A. FLOYD, each in his capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST; WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, WILLIAM A. COBB, JR., HOWARD C. DENNIS, ALEXANDER RADOS, JOHN BEBEK, JAMES J. KIRST, JERALD B. LAIRD, C.I.T. JOHNSON, WILLIAM A. FLOYD, STEVE BILLY, CECIL MONTGOMERY, WINTON KEMMIS, MACDONALD JONES, DONALD MACINTOSH, GENE SAPPER, and DEAN SWEENEY, JR., each in his capacity as Trustee of the OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST; WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, VERNE

W. DAHNKE, WILLIAM A. FLOYD, ALEXANDER RADOS, WILLIAM SCHMIDT, HOWARD C. DENNIS, C.I.T. JOHNSON, CHARLES J. ROUNDS, JR., ROBERT LYTLE, STEVE BILLY, FRED YOUNG, DONALD MACINTOSH, DONALD GOURGUIGNON, WINTON KEMMIS, WILLIAM B. MIDDLETON, and GENE SAPPER, each in his capacity as Trustee of the OPERATING ENGINEERS TRAINING TRUST,

Appellants below;

ROBERT LEE DALLAIRE,

Appellee below.

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No.....

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WILLIAM C. WAGGONER, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS HEALTH AND WELFARE FUND, *et al.*, etc.,
Petitioners,

VS.

ROBERT LEE DALLAIRE, doing business as A-JAY EXCAVATING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners William C. Waggoner, *et al.*, each in his respective capacity as Trustee of the Operating Engineers Health and Welfare Fund, Operating Engineers Pension Trust, Operating Engineers Vacation-Holiday Savings Trust, and Operating Engineers Training Trust, respectfully pray that a Writ of Certiorari issue to review the judgment of the U. S. Court of Appeals for the Ninth Circuit entered on July 29, 1985, in Case No. 83-6275 of that Court.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 767 F.2d 589 and appears in the Appendix (A. 1a-9a) of this Petition. The findings of fact and conclusions of law of the U.S. District Court for the Central District of California are officially reported at 570 F.Supp. 1168 and appear in the Appendix (A. 10a-14a). Supplementary findings and conclusions stated orally on the record by the District Court are officially reported at 570 F.Supp. 1170. The Judgment of the District Court is officially reported at 570 F.Supp. 1177 and appears in the Appendix (A. 15a-16a). The opinion of the Court of Appeals on the first appeal is officially reported at 649 F.2d 1362.

JURISDICTION

The opinion of the Court of Appeals was filed and entered on July 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. § 185(a), 61 Stat. 156, provides as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 8(d) of the National Labor Relations Act ("NLRA"), as amended by the LMRA, 29 U.S.C. § 158(d), 61 Stat. 142, provides in pertinent part as follows:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* that *where there is in effect a collective-bargaining contract* covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that *no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification* —
>
> (1) *serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof,* or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
>
> (2) *offers to meet and confer* with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) *notifies the Federal Mediation and Conciliation Service* within thirty days after such notice of the existence of a dispute, *and* simultaneously

therewith *notifies any State or Territorial agency established to mediate and conciliate disputes* within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) *continues in full force and effect,* without resorting to strike or lock-out, *all the terms and conditions of the existing contract* for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8 to 10 of this Act [158 to 160 of this title] but such loss of status for such employee shall terminate if and when he is reemployed by such employer." (Emphasis added.)

STATEMENT OF THE CASE

Petitioners are trustees ("Trustees") of four related employee benefit trusts organized under § 302(c)(5) and (6) of the LMRA [29 U.S.C. § 186(c)(5), (6)] to receive employer contributions due under collective bargaining agreements. Respondent Robert Lee Dallaire ("Dal-

laire") is an individual doing business as A-Jay Excavating Company in the construction industry of California.

Dallaire signed a "short form" collective bargaining agreement with the International Union of Operating Engineers, Local Union No. 12 ("Local 12") on March 5, 1969. The short form agreement incorporated by reference the terms of the Master labor Agreement ("MLA") negotiated between Local 12 and the Southern California General Contractors Associations. Article II of the short form agreement obligated Dallaire to abide by all of the terms of the MLA "... *as recognized, modified and renewed* from time to time through collective bargaining ..." between Local 12 and the multiemployer associations. Article V of the short form agreement provides that the signatory employer will be bound for the term of the MLA "... and for any *renewals or extensions* thereof, unless either party shall give written notice to the other party, at least sixty (60) days prior to the termination date of the [MLA] of its desire to terminate." (Emphasis added.)

In May, 1977, the Trustees filed suit against Dallaire under § 301(a) of the LMRA for payment of delinquent amounts due under the agreement. Before the first trial, Dallaire made a written stipulation of fact that the short form agreement "... also obligated [Dallaire] to modifications and renewals of the MLA, unless due notice of cancellation was given." However, after the District Court entered judgment for Dallaire and the Trustees appealed, Dallaire sought to argue on appeal that the short form agreement had terminated automatically without written notice on July 1, 1969, when the employer associations and Local 12 renegotiated and amended the MLA. The Court of Appeals reversed the judgment of the District Court on other grounds and declined to consider

the merits of the "automatic termination" issue in light of Dallaire's failure to raise and preserve the issue in the trial court. 649 F.2d at 1369. Nevertheless, the Court of Appeals stated that Dallaire "may request modification of the pretrial order on remand" to raise the "automatic termination" issue. *Ibid.*

On remand, the District Court permitted amendment of the pretrial order to delete the stipulation of fact that Dallaire was bound to modifications of the MLA unless due notice of cancellation was given, and to raise the contention that the short form agreement terminated automatically without notice. The District Court then conducted a new trial, ruled inadmissible the Trustees' extrinsic evidence that such short form agreements had been treated by Local 12 and other employers as continuing to incorporate the MLA as amended unless a timely written notice of termination is given, and further ruled that Dallaire's short form agreement unambiguously terminated automatically without written notice. The District Court ruled that § 8(d) of the NLRA requiring a written notice at least 60 days in advance of termination of any collective bargaining agreement applies only when such an agreement is being terminated by a party, and "does not govern" when the agreement "expires" by its own terms. 570 F.Supp. at 1173.

On the second appeal, the Court of Appeals again reversed the District Court on other grounds, but ruled that the courts are preempted by the exclusive jurisdiction of the National Labor Relations Board ("NLRB") from considering the requirements of § 8(d) in determining the proper interpretation of the short form agreement. A. 6a. 767 F.2d at 592.

REASONS FOR GRANTING THE WRIT

I

THE SHORT FORM COLLECTIVE BARGAINING AGREEMENT SHOULD BE INTERPRETED IN LIGHT OF THE LAW RELATING TO IT WHEN MADE.

The Court of Appeals ruled that extrinsic evidence of the intended meaning of the short form agreement should be considered (A. 5a-6a), because the agreement is ambiguous as to whether a written notice of termination is required when the incorporated MLA is modified, citing *Kemmis v. McGoldrick,* 767 F.2d 594, 597 (9th Cir. 1985). By one reading, the short form agreement remains in effect and incorporates the terms of the amended MLA unless the employer has given Local 12 a written notice of termination at least 60 days prior to the end of the term of the MLA. By an alternative reading, however, the short form agreement might be interpreted as terminating automatically without a written notice by one party to the other if the amended MLA is not viewed as a "renewal or extension" of the MLA.

In the absence of any conflicting statute, the Court of Appeals would be correct in considering extrinsic evidence of intent in order to interpret the collective bargaining agreement. *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157, 161, 87 S.Ct. 369, 371 (1966). However, the alternative interpretation of the short form agreement provides for termination without written notice from one party to the other, directly contravening § 8(d) of the NLRA governing collective bargaining agreements.

Section 8(d) requires that a *written notice of termination* be given at least 60 days prior to the expiration date

of a collective bargaining agreement, requires the parties to *meet and confer,* requires *additional written notices* to the Federal Mediation and Conciliation Service and to the appropriate state agency, further requires that *the agreement be continued* "in full force and effect" *until expiration of the 60 days notice* or the term of the agreement, whichever occurs later, and *prohibits striking* during the 60 days of negotiation. [29 U.S.C. § 158(d)(1), (2), (3), (4)]. The aim of § 8(d) is "to bring about the termination and modification of collective bargaining agreements *without interrupting the flow of commerce or the production of goods* . . ." (Emphasis added.) *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187, 92 S.Ct. 383, 402 (1971).

Clearly, if the short form agreement is interpreted as terminating automatically with no written notice of termination, the agreement would directly contravene the provisions and policy of § 8(d) requiring a written notice of termination at least 60 days in advance. However, this Court's previous decisions do not permit a collective bargaining agreement to be construed to such an unlawful effect.

> "Since a general rule of construction presumes the legality and enforceability of contracts (citation omitted), ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable." *Walsh v. Schlecht*, 429 U.S. 401, 408, 97 S.Ct. 679, 685 (1977).

Moreover, a collective bargaining agreement is properly interpreted "as a whole and in light of the law relating to it when made." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 279, 76 S.Ct. 349, 356 (1956). The Court of Appeals

should have considered § 8(d) and determined that "automatic termination" without a written notice at least 60 days in advance is not a lawful or permissible interpretation of the short form collective bargaining agreement.

The Court of Appeals ruled that the exclusive jurisdiction of the NLRB preempts judicial consideration of § 8(d) in this § 301 suit, but this Court's decisions plainly require a contrary result. Section 8(d) is part and parcel of the "penumbra of express statutory mandates" properly to be considered by the courts in fashioning the federal substantive law which governs the interpretation and enforcement of collective bargaining agreements in § 301 suits. *Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448, 456-57, 77 S.Ct. 912, 918 (1957). While court jurisdiction under § 301 does not extend to the enforcement of unfair labor practice statutes, and § 301 jurisdiction "is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself," *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 300-301, 91 S.Ct. 1909, 1925 (1971), "... the basic policies found controlling in an unfair labor practice context may [not] be disregarded by the courts in a suit under § 301 ...." *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board,* 417 U.S. 249, 256, 94 S.Ct. 2236, 2240 (1974).

In practically every § 301 action, the court is called upon to construe a collective bargaining agreement in the manner which best effectuates national labor policy as reflected in the NLRA. *See, e.g., John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 548-50, 84 S.Ct. 909, 914-15 (1964). When this Court construed *Wiley* in *Howard Johnson Co. v. Detroit Local Joint Executive Board,* the Court made clear that labor policies developed in the unfair labor practice context of *N.L.R.B. v. Burns Interna-*

tional Security Services, Inc., 406 U.S. 272, 92 S.Ct. 1571 (1972), are not to be disregarded by the courts in construing obligations arising under the collective bargaining agreement.

> "It would be plainly inconsistent with [*Lincoln Mills*] to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301 . . . Clearly the reasoning of *Burns* must be taken into account here." 417 U.S. at 256, 94 S.Ct. at 2240.

Burns, it should be noted, involved interpretation of the provisions and policies of § 8(d) of the NLRA. 406 U.S. at 282-83, 92 S.Ct. at 1579-80.

In another § 301 action, *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 219, 100 S.Ct. 410, 415 (1979), this Court directly construed § 8(d) in arriving at the proper interpretation of a "best efforts" no-strike clause in a collective bargaining agreement.[1] Clearly, the Court of

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[1]In contexts other than termination of short form collective bargaining agreements, the courts of appeals, including the Ninth Circuit, frequently construe § 8(d). *See, e.g., Hawkins v. Bennett*, 704 F.2d 1157, 1160, n. 1 (9th Cir. 1983) [§ 8(d) considered in a ruling that arbitration of trustee disputes is mandatory in a § 302 suit for appointment of an arbitrator in a deadlocked trustee dispute]; *Kolinske v. Lubbers*, 712 F.2d 471, 478 (D.C. Cir. 1983) [§ 8(d) construed in suit for violation for constitutional rights and for breach of duty of fair representation]; *Feather v. United Mine Workers*, 711 F.2d 530, 542 (3rd Cir. 1983) [§ 8(d) considered in suit under § 303 for damages caused by alleged secondary boycott and antitrust violations]; *Communications Workers v. Southwestern Bell Telephone Co.*, 713 F.2d 1118, 1122-27 (5th Cir. 1983) [§ 8(d) construed to determine whether collective bargaining agreement was effectively terminated in a suit to enforce arbitration award]; *U.A.W. v. Yard-Man Inc.*, 716 F.2d 1476, 1485 (6th Cir. 1983) [§ 8(d) construed in a § 301 suit to compel arbitration or for damages arising from breach of

Appeals erred in failing to consider § 8(d) when deciding that a permissible interpretation of the short form collective bargaining agreement would allow automatic termination without written notice.

II

A COURT MUST DENY ENFORCEMENT OF AN ILLEGAL INTERPRETATION OF A COLLECTIVE BARGAINING AGREEMENT, INCLUDING AN "AUTOMATIC TERMINATION" PROVISION WHICH VIOLATES § 8(d).

In *Kaiser Steel Corporation v. Mullins,* 455 U.S. 72, 102 S.Ct. 851 (1982), the Court left "no doubt that illegal promises will not be enforced in cases controlled by the federal law." *Id.,* 455 U.S. at 77, 102 S.Ct. at 856. In determining whether a collective bargaining agreement obligation to pay fringe benefit contributions would be enforced in light of a defense that the agreement was illegal under § 8(e) of the NLRA, the Court ruled that the § 8(e) defense was not preempted by the primary jurisdiction of the NLRB because "a federal court has a duty to determine whether a contract violates a federal law before enforcing it." *Id.,* 455 U.S. at 83, 102 S.Ct. at 859. The Court further stated:

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collective bargaining agreement]; *U.S. v. Russo,* 708 F.2d 209, 221 (6th Cir. 1983) [§ 8(d) construed to determine whether criminal activity occurred in collective bargaining]; *In the Matter of Braaa Miller Freight System, Inc.,* 702 F.2d 890 (11th Cir. 1983) [§ 8(d) construed to determine requirements for a debtor-in-possession to terminate a collective bargaining agreement as an executory contract in bankruptcy proceedings]; and *Ottley v. Sheepshead Nursing Home,* 688 F.2d 883, 889-90, 892-95 (2nd Cir. 1982) [enforcing arbitration award because duty to arbitrate existed under a collective bargaining agreement whose term was extended by failure to give written notice as required by § 8(d)].

> "While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e). Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court." *Id.*, 455 U.S. at 86, 102 S.Ct. at 861.

The same reasoning applies with even greater clarity to § 8(d), because § 8(d) defines "the duty to bargain collectively" as a basic concept of labor law, while § 8(e) sets forth a specific unfair labor practice for which the NLRB is authorized to provide "affirmative remedies." In that circumstance, judicial consideration of § 8(d) should be less an infringement upon the primary jurisdiction of the NLRB than necessarily occurs with § 8(e).

But as with § 8(e), if a court makes a final determination that a collective bargaining agreement has expired automatically by its terms without a prior written notice of termination as required by § 8(d), that ruling will be insulated from collateral review in any other forum. Moreover, when courts repeatedly rule that collective bargaining agreements may terminate automatically, private parties will be encouraged to act accordingly, to the detriment of the policies of § 8(d).

Thus, when a party to a collective bargaining agreement contends that the agreement has terminated automatically without written notice, "... a court must entertain ..." consideration of § 8(d) and rule that such an interpretation would render the agreement unlawful under § 8(d) *Cf., id.*, 455 U.S. at 86, 102 S.Ct. at 861. Under *Walsh v. Schlecht, supra,* 429 U.S. at 408, 97 S.Ct. at 685, such an unlawful interpretation would be rejected by the court in favor of "a construction that renders [the agreement] legal and enforceable."

III

PERMITTING TERMINATION OF COLLECTIVE BARGAINING AGREEMENTS WITHOUT WRITTEN NOTICE, AND WITHOUT CONSIDERATION OF THE REQUIREMENTS OF § 8(d), WOULD BE AN IMPORTANT DESTABILIZING INFLUENCE ON LABOR RELATIONS.

Based on the decision in this case and *Arizona Laborers, Teamsters and Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1515-7 (9th Cir. 1985), the law of the Ninth Circuit permits district courts to determine on a case-by-case basis whether existing collective bargaining agreements terminate automatically without written notice, regardless of the policies and provisions of § 8(d). Local 12 alone has collective bargaining agreements with approximately 6,000 employers in southern California and southern Nevada, the majority of whom are bound to individual short form agreements similar to the agreement in this case. Other unions in the building and construction trades throughout the country commonly sign such agreements with employers, giving rise to many thousands of such agreements in the construction industry alone.[2] In the construction industry, based upon Local 12's experience

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[2] *See, e.g., International Union of Operating Engineers, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 492, 92 S.Ct. 1710 (1972) (dissenting op.) [union's memorandum with Flair adopted terms of master agreement]; *Construction Teamsters Health & Welfare Trust v. Con Form Construction Corp.*, 657 F.2d 1101, 1102 (9th Cir. 1981) [Teamsters short-form agreement incorporated master agreement]; *Ted Hicks & Associates, Inc. v. N.L.R.B.*, 572 F.2d 1024, 1025 (5th Cir. 1978) [Carpenters short-form agreement]; *Scenic Land Properties, Inc. v. Carpenters Local 162*, 103 LRRM 2127, 2128 (N.D. Cal. 1979) ["the Memorandum Agreement at issue here is commonly used in the construction industry"].

and the reported cases of other unions, such short form agreements are estimated to be presently in effect with more than 100,000 employers. Of course, the decision of the Court of Appeals to disregard § 8(d) in determining whether a collective bargaining agreement can terminate without written notice affects the stability of labor relations in *all* industries, not the construction industry alone — *and* affects *all* collective bargaining agreements, *not only* short form agreements.

Thus, the issue presented by this petition has important implications. Absent review by this Court, many thousands of existing collective bargaining agreements may be viewed as subject to termination without written notice. Review of the Ninth Circuit decision will assure that the policies of the NLRA will be effectuated through the decisions of courts in § 301 actions, and will safeguard against the increased judicial caseload which otherwise may be anticipated as arising from this significant destabilization of termination procedures under collective bargaining agreements.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

Dated: October 23, 1985

Respectfully submitted,

WAYNE JETT*
JETT, CLIFFORD & LAQUER,
Counsel for Petitioners.
**Counsel of Record.*

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM C. WAGGONER, et al.,
Plaintiffs/Appellants,

VS.

ROBERT LEE DALLAIRE, etc.,
Defendant/Appellee.

No. 83-6275
D.C. No. CV 77-1654-AAH

Filed: July 29, 1985.

On Appeal from the United States District Court
for the Central District of California
Hon. A. Andrew Hauk, Senior District Judge,
presiding.

Argued and submitted —
February 8, 1985 — Pasadena, California.

Before: BOOCHEVER and BEEZER, Circuit Judges, and SOLOMON*, DISTRICT JUDGE.

BOOCHEVER, Circuit Judge:

Waggoner, *et al.* (the trustees) appeal the district court's decision that Dallaire, the owner of an excavating company, was not bound by the terms of a multiple-employer labor agreement. Because the district court

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

erred in excluding relevant evidence of industry custom and in permitting withdrawal of a stipulation affecting the statute of limitations issue, we reverse the judgment of the district court and remand for further proceedings.

The facts which led to this appeal are set forth in our opinion in a prior appeal in this case, *Waggoner v. Dallaire,* 649 F.2d 1362, 1365 (9th Cir. 1981) (*Waggoner I*), but we shall summarize them here. In 1969, Dallaire, the president of the A-Jay Excavating Company, signed a short form collective bargaining agreement with the International Union of Operating Engineers Local Union No. 12 (Local 12). The short form incorporated by reference a master labor agreement (MLA) between Local 12 and a multi-employer association. The MLA required employers to contribute to employee benefit trusts. In July 1970, Dallaire falsely told the trustees of the benefit funds that he was an inactive employer, and thereafter stopped contributing to the trusts. *Id.* at 1368. In fact Dallaire continued to do business after July 1970.

In 1977, the trustees sued Dallaire in district court under section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1982), for delinquent trust fund contributions. Dallaire testified that he had been induced to sign the short form by oral assurances from Local 12's business agent that he would not be held to the terms of the MLA. The district court found for Dallaire. Based on the alleged oral assurances, the court held that the short form was invalid for fraud in the inducement. In the alternative, the court found the short form an unenforceable adhesion contract. The court further ruled that the four year statute of limitations barred the trustees' suit.

The trustees appealed that judgment, and this court reversed and remanded. As to the fraudulent inducement

claim, we held that the oral modifications alleged by Dallaire were inadmissable to vary the terms of a written collective bargaining agreement. *Waggoner I,* 649 F.2d at 1365-66; *accord Kemmis v. McGoldrick,* 706 F.2d 993, 996-97 (9th Cir. 1983) (*Kemmis I*). As to the adhesion contract argument, we found that the district court had erred as a matter of law in characterizing this collective bargaining agreement as a contract of adhesion. *Waggoner I,* 649 F.2d at 1367. We further ruled that the district court had erred in holding that the statute of limitations barred the trustees' claim, because the false report that Dallaire was an inactive employer, which Dallaire had stipulated to at trial, tolled the statute. *Id.* at 1367-68.

On appeal in *Waggoner I,* Dallaire argued for the first time that the short form agreement signed in March 1969 had terminated in July 1969 when the MLA was renegotiated. The short form incorporated the MLA as renewed or extended, but the MLA at issue here was modified, and Dallaire argued that the short form by its terms expired upon modification of the MLA. *See Seymour v. Coughlin Co.,* 609 F.2d 346, 349-50 (9th Cir. 1979), *cert. denied,* 446 U.S. 957 (1980). We declined to rule on the issue because it was not included in the pretrial order below, but we noted that Dallaire could request modification of the pretrial order on remand. *Waggoner I,* 649 F.2d at 1369.

On remand, the district court allowed modification of the pretrial order to add the modification issue and also permitted Dallaire to withdraw its stipulation that it had told the trustees that it was an inactive employer. The court that conducted a new trial, at which it refused to admit Local 12's evidence of industry custom on the issue whether the parties intended the short form to bind them to the modified MLA. The court held once again for

Dallaire, on the ground that the short form expired upon modification of the MLA, and that the statute of limitations barred the trustees' claim. The court awarded Dallaire, as the prevailing party, attorneys' fees and costs. The trustees again appeal, asserting four grounds for reversal.

I

INCLUSION OF THE MODIFICATION ISSUE

In *Waggoner I,* we noted that Dallaire could request amendment of the pretrial order on remand to include the issue whether modification of the MLA terminated the short form agreement. 649 F.2d at 1369. Dallaire requested such an amendment and the district court granted it and ruled on the issue. The trustees contend that we erred in suggesting that a new issue could be raised on remand and that the district court erred in allowing the new issue to be raised.

The trustees argue that a longstanding federal policy against piecemeal adjudication of claims precludes the injection of a new issue on remand. *See Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 178-79 (1955). *Bodinger,* however, discusses piecemeal appeals, and none of the cases cited by the trustees stand for the proposition that a pretrial order may not be amended on remand. They each hold either that an issue not included in the pretrial order may not be raised at trial unless the order is modified, or that an issue not raised at trial may not be raised on appeal.[1] In this case, the district court properly

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[1]*See Southern California Retail Clerks Union & Food Employers Joint Pension Trust Fund v. Bjorklund,* 728 F.2d 1262, 1264 (9th Cir. 1984); *Higgings v. Harden,* 644 F.2d 1348, 1353 (9th Cir. 1981); *Knutson v. Daily Review, Inc.,* 548 F.2d 795, 802 n. 8 (9th Cir. 1976),

modified the pretrial order under Fed. R. Civ. P. 16(e), and our opinion in *Waggoner I* precludes the trustees' argument that the modification was an abuse of discretion.[2] *See Waggoner I*, 649 F.2d at 1369.

II

EVIDENCE OF INDUSTRY CUSTOM

At the trial after remand, the district court refused to admit the trustees' evidence of industry custom on the issue whether the parties to the short form intended to be bound by modifications to the MLA. The district court misconstrued our opinion in *Kemmis I*, 706 F.2d at 996-97, as prohibiting any oral evidence in the interpretation of collective bargaining agreements.[3] *Kemmis I* does not so

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cert. denied, 433 U.S. 910 (1977); *Westinghouse Electric Corp. v. Weigel*, 426 F.2d 1356, 1357 (9th Cir. 1970) (per curiam); *Drop Dead Co. v. S.C. Johnson & Son*, 326 F.2d 87, 95 (9th Cir. 1963), *cert. denied*, 377 U.S. 907 (1964).

[2]Dallaire had also stipulated at the first trial that the short form bound him to modified MLAs unless he gave notice of cancellation. The district court allowed Dallaire to withdraw this stipulation on remand. We believe that our suggestion in *Waggoner I* that the pretrial order could be amended on remand to include the modification issue necessarily although tacitly approved the withdrawal of this stipulation. Thus we need not discuss whether permitting the withdrawal was within the district court's discretion.

[3]We also note that the district court apparently felt bound as a matter of law to interpret the short form agreement in this case in the same way as the similar short form agreement construed in *Seymour*, 609 F.2d at 349-50. As we have previously held, however, and reemphasize today in *Kemmis v. McGoldrick*, No. 83-6292 (*Kemmis II*), *Seymour* did not announce a per se rule of interpretation: "a case by case analysis of the agreements involved provides the best evidence of the parties' intent." *Construction Teamsters Health & Welfare Trust v. Con Form Construction Corp.*, 657 F.2d 1101, 1103 (9th Cir. 1981) (quoted in *Kemmis II*, slip op. at ____).

hold. As we reaffirmed today in a second appeal in that case, *Kemmis v. McGoldrick,* No. 83-6292 (*Kemmis II*), *Kemmis I* prohibited testimony as to oral agreements between the contracting parties, not oral testimony as to industry custom. *Kemmis I* and *Kemmis II* both state that a court should consider industry custom in interpreting collective bargaining agreements. *Kemmis II,* slip op. at ____; *Kemmis I,* 706 F.2d at 996; *accord Transportation-Communication Employees Union v. Union Pacific Railroad,* 385 U.S. 157, 161 (1966). The district court therefore erred in refusing to admit the evidence of industry custom.

III

THE SECTION 8(d) ARGUMENT

The trustees argue that the district court's interpretation of the short form agreement is erroneous because it is inconsistent with the requirements of section 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(d) (1982). We may not reach the merits of the trustees' section 8(d) theory, however, for we have recently held that the federal courts lack jurisdiction to consider claims based on violations of section 8 of the NLRA. Exclusive jurisdiction over section 8 claims rests with the National Labor Relations Board. *Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.,* 753 F.2d 1512, 1515-17 (9th Cir. 1985).

IV

THE STATUE OF LIMITATIONS

The trustees brought this action under section 301 of the LMRA, and the appropriate statute of limitations is

therefore provided by the forum state, in this case California. The applicable California statute of limitations is four years. Cal. Civ. Proc. Code § 337 (Deering 1977); *see Waggoner I,* 649 F.2d at 1367. Dallaire stopped making contributions in 1970 and the trustees brought suit in May 1977.

At the first trial, the district court held that all claims for delinquent contributions were barred by the statute. We reversed, for several reasons. As to the contributions allegedly due from 1973 to 1977, we found that under California law, "the statute of limitations on a monthly payment provision of a written contract does not run until the due date of each monthly payment. As the MLA calls for monthly trust payments, the Trustees timely filed their action at least with respect to claims arising after May 6, 1973." *Waggoner I,* 649 F.2d at 1368 (citations omitted).

As to the contributions allegedly due prior to May 1973, we held that the misleading 1970 report by Dallaire that it was an inactive employer, which Dallaire stipulated to below, tolled the statute of limitations. *Id.* On remand, the district court permitted Dallaire to withdraw the stipulation as to the report and to offer contrary testimony. The court then apparently held that the statute was not tolled and again applied it to bar the trustees' claim. The trustees argue that the district court's actions were erroneous under the law of the case doctrine.

The law of the case doctrine states that the decision of an appellate court on a legal issue "must be followed in all subsequent proceedings in the same case." *Planned Parenthood v. Arizona,* 718 F.2d 938, 949 (9th Cir. 1983); *accord Moore v. Jas. H. Matthews & Co.,* 682 F.2d 830, 833-34 (9th Cir. 1982). The law of the case controls unless the first decision is clearly erroneous and would result in

manifest injustice, there has been an intervening change in the law, or the evidence on remand is substantially different. *Planned Parenthood,* 718 F.2d at 949.

Dallaire argues that the substantially different evidence exception applies here. Dallaire construes the holding in *Waggoner I* regarding the statute of limitations as resting solely on the stipulation. Withdrawal of the stipulation, Dallaire argues, made the evidence on remand substantially different and justified the district court's departure from the law of the case. Dallaire's argument overlooks the fact that the withdrawal of the stipulation was itself error. The stipulation and our first decision on its legal effect were part of the law of this case. The trial court thus could not permit Dallaire to withdraw the stipulation unless Dallaire presented evidence to the court showing that withdrawal of the stipulation was necessary to prevent manifest injustice. Nowhere in Dallaire's argument to this court did he indicate that he presented any such evidence. Thus we must conclude that the district court erred in permitting withdrawal of the stipulation. *See McGregor Boulevard Church of Christ v. Walling,* 428 F.2d 401, 404 (5th Cir. 1970).

On remand, the trial court should only have considered " 'matters left open by the mandate of this court.' " *Moore,* 682 F.2d at 834 (quoting *Quern v. Jordan,* 440 U.S. 332, 347 n.18 (1979)). The limitations issue was not left open by our mandate in *Waggoner I,* and the trial court was not entitled to deviate from that mandate. *In re Beverly Hills Bancorp,* 752 F.2d 1334, 1337 (9th Cir. 1984). As we held in *Waggoner I,* the statute of limitations does not bar the trustees' claims for any part of the time period between July 1970 and May 1977, and this issue may not be considered again on remand.

V

ATTORNEYS' FEES

The trustees argue that even if the district court's decision for Dallaire was correct, it was an abuse of discretion to award Dallaire attorneys' fees. We need not reach this issue, because our reversal of the district court on the merits requires us to vacate the award.

CONCLUSION

The judgment of the district court is reversed. We reluctantly remand again for a determination of whether the parties intended the short form agreement to terminate upon modification of the MLA. Custom evidence shall be admissable on the issue. The award of attorneys' fees is vacated.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM C. WAGGONER, et al., etc.,
Plaintiffs,

vs.

ROBERT LEE DALLAIRE, etc.,
Defendants.

No. CV 77-1654 AAH

FORMAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

(For Defendant and Against Plaintiff)
Filed: August 26, 1983

FINDINGS OF FACT

1. The plaintiffs are the trustees for Operating Engineers Trusts (viz: the Health and Welfare Fund, the Pension Trust, the Vacation-Holiday Savings Trust and the Journeymen and Apprenticeship Training Trust). These trusts are express trusts created under 29 U.S.C., Section 186, by virtue of collective bargaining agreement and trust agreements between the International Union of Operating Engineers, Local No. 12 (UNION), and the Southern California General Contractors' Association (CONTRACTORS).

2. UNION is a labor organization within the meaning of the National Labor Relations Act, as amended, 29 U.S.C., Section 152(5).

3. The defendant is a licensed construction contractor and is an employer within the meaning of the National

Labor Relations Act, as amended, 29 U.S.C., Section 152(2)(6)(7).

4. The defendant ROBERT DALLAIRE, who at all relevant times was a sole proprietor doing business under the name A-JAY EXCAVATING (A-JAY), signed a short form collective bargaining agreement (SHORT FORM) with UNION on or about March 5, 1969.

5. The SHORT FORM incorporated most of the terms, including those governing the pension fund contributions of the Master Labor Agreement (MLA), a multiple employer collective bargaining agreement negotiated between the UNION and CONTRACTORS.

6. The MLA had a term of four (4) years and was to expire on July 1, 1969.

7. A-JAY was not a member of any of the several Southern California or Southern Nevada general contractors' associations constituting CONTRACTORS. A-JAY was not a party to the MLA at the time CONTRACTORS executed the MLA with the UNION.

8. Neither the UNION nor A-JAY gave notice (written or otherwise) to the other party of a desire to terminate or modify the SHORT FORM between them before July 1, 1969.

9. Prior to July 1, 1969, A-JAY reported hours of employment to the UNION and paid contributions to the trusts.

10. After July 1, 1969, and specifically in October 1969, A-JAY reported hours worked by DALE TAYLOR to the UNION. Contributions were paid to the various trusts by A-JAY as a result of these hours worked.

11. No hours of employment were reported to the UNION by A-JAY after October, 1969. No contributions

were paid to the various trusts by A-JAY after October 1969.

12. The SHORT FORM was effective by the provisions of its Article V for the term of the 1965-1969 MLA and any "renewals or extensions" thereof.

13. Article V of the SHORT FORM is clear and unambiguous in intent and effect.

14. Article V of the SHORT FORM is the termination clause and controlled the termination date of the SHORT FORM.

15. Article II of the SHORT FORM is jurisdictional in nature and has no effect as to termination of the SHORT FORM.

16. The 1965-1969 MLA was not extended or renewed.

17. The 1969-1974 MLA was a new and different agreement and not a renewal or extension of the 1965-1969 MLA.

18. The 1965-1969 MLA terminated on July 1, 1969.

19. The SHORT FORM signed by defendant DALLAIRE, on behalf of A-JAY, terminated simultaneously with the termination of the 1965-1969 MLA on July 1, 1969.

20. The SHORT FORM and MLA here under consideration is the same as interpreted in *Seymour v. Coughlin Co.*, 609 F.2d 346 [1979].

21. Plaintiffs claim no recovery for contributions during the effective term of the SHORT FORM or 1965-1969 MLA.

22. Defendant was not a party to the collective bargaining agreement negotiated between UNION and CONTRACTORS.

23. The defendant, as prevailing party, is entitled to attorneys' fees pursuant to California Civil Code Section 1717.

CONCLUSIONS OF LAW

1. This court has jurisdiction over this action under Section 301(a) of the Labor Management Relation Act [29 U.S.C. § 185(a)].

2. Defendant A-JAY was bound by its SHORT FORM with UNION for the period March 5, 1969 to July 1, 1969. Said SHORT FORM incorporated by reference some of the terms of the then existing MLA in effect between UNION and CONTRACTORS. Said SHORT FORM also incorporated by reference any renewals or extensions of the then existing MLA. The then existing MLA was neither renewed or extended. Rather, a new and different MLA was entered into between UNION and CONTRACTORS, which went into effect on the day the prior MLA expired, namely July 1, 1969.

3. Defendant A-JAY was bound to the 1965-1969 MLA even if he misunderstood the terms of the agreement.

4. Defendant A-JAY's later conduct brought about by its misunderstanding of the terms of the SHORT FORM did not vary the terms of the SHORT FORM.

5. Later conduct on one of the parties to a contract will not resurrect a contract which has expired by it's [sic] clear and unambiguous terms.

6. Defendant A-JAY made all required payments of fringe benefit contributions to plaintiffs for each and every hour worked by or paid to employees performing any work covered by the MLA to which it was bound.

7. Defendant A-JAY is entitled to attorney's fees and costs of suit as may be shown.

8. Plaintiffs shall take nothing by their complaint against defendant A-JAY.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: August 24, 1983
11:00 A.M.

A. ANDREW HAUK
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM C. WAGGONER, et al., etc.,
Plaintiffs,

vs.

ROBERT LEE DALLAIRE, etc.,
Defendants.

No. CV77-1654-AAH

JUDGMENT
(For Defendant and Against Plaintiffs)

Filed: August 26, 1983

Pursuant to the Mandate and Opinion of the Court of Appeals for the Ninth Circuit, entitled *"Waggoner, et al., v. DALLAIRE,"* 649 F.2d 1362 (9th Cir. July 10, 1981), No. C.A. 79-3543, the above entitled matter came on regularly for retrial by the Court, sitting without a jury, on August 22, 1983, and continued from day to day thereafter until August 24, 1983, whereupon, after due consideration and submission the Court made, signed, filed and entered its findings of fact, conclusions of law and order for judgment. Based upon said findings of fact, conclusions of law, and order for judgment, and good cause appearing, the Court now renders its Judgment in favor of defendant and against plaintiffs, as follows:

IT IS ORDERED, ADJUDGED AND DECREED:

(1) Plaintiffs shall take nothing against defendant by reason of their Complaint herein or by reason

of any cause of action alleged or attempted to be alleged in said Complaint.

(2) Defendant shall have and recover against and from plaintiffs his reasonable attorneys fees in this matter in the total sum of $14,499.83.

(3) Defendant shall have and recover from plaintiffs his costs of suit incurred herein which are hereby taxed in the amount of $_____.

(4) The Clerk of Court shall forthwith file and enter the findings of fact, conclusions of law and order for judgment aforesaid, and this Judgment, and serve copies thereof upon all counsel of record for all parties herein.

DATED: August 26, 1983
2:40 P.M.

A. ANDREW HAUK
United States District Judge